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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/714,694	11/17/2003	Lowell R. Wedemeyer	CheckAir	5398
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LOWELL R. WEDEMEYER 719 YARMOUTH ROAD, SUITE 204 PALOS VERDES ESTATES, CA 90274			EXAMINER JACKSON, BRANDON LEE	
			ART UNIT	PAPER NUMBER
			3772	
			MAIL DATE	DELIVERY MODE
			11/09/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/714,694

Applicant(s)

WEDEMEYER, LOWELL R.

Examiner

Brandon Jackson

Art Unit

3772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 September 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 33-43 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 33-43 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application
- ☐ Other: _____

DETAILED ACTION

This action is in response to amendments/arguments filed 9/12/2007. Currently, claims 33-43 are pending in the instant application.

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 9/12/2007 has been entered.

Response to Arguments

Applicant's arguments filed 9/12/2007 have been fully considered but they are not persuasive. Applicant argues the amended claim language of the device "sized to fit in one of a user's cheek pouches" obviated the Leal rejection because the Leal device fits within both of the user's cheek pouches. However, claiming the device fits in one cheek pouch does not limit it to not be able to fit in the other cheek pouch, because there is no negative limitation preventing it from being within both cheek pouches. Further, Applicant argues the Leal device cannot be compressed by the soft tissue of the mouth, however, this feature has not been claimed. Moreover, the device would be able to be compressed by the user's jaw and teeth if it can be compresses by two finger

that are weaker than the jaw of a person, wherein the teeth would fit into the spot where the two fingers compress the device. Applicant argues the Leal device's intended use is to keep the patient's mouth open and therefore would not be able to be compressed by the mouth. However, just because a device is intended to hold the mouth open does not mean it cannot be compressed by the mouth. During a dental procedure the patient's mouth is usually passively applying a compressive force, not the full bite force of the mouth, which could be used to compress the device. In addition, Applicant argues that if the Leal device may be compressed it would be malfunctioning, however, the device needs to be compressed in order to be removed from the user's mouth after the procedure is done. Applicant argues the device could not be adjusted by bending of the wires to expand loop size to affect the total span size of the device because it would create an A-symmetrical device and the device is not all made of the resilient material. However, the device is a continuous piece of material, therefore it is all made of the same material. Moreover, an A-symmetrical device may be needed for user's having an over-bite or some other affliction that would cause their mouth to be A-symmetrical. Also, to prevent the A-symmetry the loops on the top and bottom portions could be adjusted equally to maintain symmetry.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

Art Unit: 3772

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 33- 36 and 39-42 are rejected under 35 U.S.C. 102(b) as being anticipated by Leal (U.S. Patent 5,199,872). Leal discloses a cheek anchor device (10) for maintaining mouth position (col. 1, lines 64-66), comprising a spring element (40) adapted to be placed in the cheek pouch, compressed when the jaw is closed, and to resiliently expand to open the mouth during a procedure (col. 1, lines 7-12). The “adapted to ...” language has not been considered since it has been held that the recitation that an element is “adapted to” perform a function is not a positive limitation, but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchinson*, 69 USPQ 138. The device (10) has a conduit col. 4, lines 56-63) for fluid. Examiner has given the term conduit its broadest, most reasonable definition, which is an element with a hole therethrough that can transfer air of fluid, which is the cotton surround the spring element (40). The device (10) is formed of metal (col. 1, lines 52-55) and configured into a plurality of loops (fig. 1), wherein if one loop has its span increased or decreased it will result in another loop increasing or decreasing span because the device is made of continuous pieces of wire. The plurality of loops is combined to form a spring element (40) with an element span size (fig. 1).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

Art Unit: 3772

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining

obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 37-38 and 43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Leal (U.S. Patent 5,199,872) in view of Diaz (U.S. Patent 4,041,937). Leal substantially discloses the claimed invention, see claim 33 rejection above, Leal fails to disclose the spring element is adapted to receive impregnation or coating with a substance to be released in the user's mouth. However, Diaz teaches cotton swab (28a) moistened with antiseptic (col. 1, lines 58-61). Therefore, it would be obvious to one of ordinary skill in the art at the time of the invention to coat the cotton of the Leal device with antiseptic to prevent infection in the mouth and provide a pleasant taste to the user. The "adapted to ..." language has not been considered since it has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation, but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchinson*, 69 USPQ 138.

Conclusion

Art Unit: 3772

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brandon Jackson whose telephone number is (571)272-3414. The examiner can normally be reached on Monday - Friday 8-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Bianco can be reached on (571)272-4940. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Brandon Jackson 11/2/07
Brandon Jackson
Examiner
Art Unit 3772

BLJ

Patricia Bianco
PATRICIA BIANCO
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11/8/07